

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB- REGISTRY]

AT ARUSHA

LAND APPEAL NO. 63 OF 2023

(C/F Application No. 18 of 2019 District Land and Housing Tribunal of Karatu at Karatu)

BLANKA MICHAEL DIONIS APPELLANT

VERSUS

NICODEMS TLUWAY RESPONDENT

JUDGMENT

21st November & 15th December, 2023

TIGANGA, J.

In Land Application No. 18 of 2019, the respondent herein filed a complaint at the District Land and Housing Tribunal of Karatu at Karatu (the trial tribunal) alleging that, the appellant herein trespassed into his suit land measuring one (1) acre located at Kambi ya Simba Village, Mbulumbulu Ward within Karatu District in Arusha Region (the suit land.)

At the trial tribunal, evidence showed that the respondent herein successfully bought the suit land at a public auction back in 2018, after the appellant's wife had failed to pay a loan of Tshs. 10,000,000/= which she allegedly took from KKKT Mbulumbulu Saccos Ltd. and pledged the suit land as collateral. The suit before the trial tribunal was against the current appellant who happened to be the husband of the person who took the loan.

Aggrieved with the decision, the appellant preferred this appeal on the following five (5) grounds;

1. That, the trial chairman of the tribunal grossly erred in law and fact in failing to analyze properly the evidence adduced from both side as a result the tribunal delivered a wrong decision.
2. That, the trial tribunal mis-directed it by answering the first issue in favour of the respondent herein while he failed to prove the case at the balance of probability contrary to section 110 and 111 of the **Evidence Act**, Cap 6 R.E. 2019.
3. That, the trial chairman of the tribunal grossly erred in law and in fact in delivering a judgment without noting that, the auction was done contrary to the laws governing auction in Tanzania.
4. That, the trial tribunal erred in law and in fact in entertaining the application which suffers mis-joinder of parties.
5. That, the trial chairman of the tribunal grossly erred in law and in fact in entertaining hearsay and personal assumptions in reaching to the conclusion in favour of the respondent.

With leave of the Court, hearing of the appeal was by way of written submissions, the appellant was represented by Mr. Thomas Kizito whereas the respondent was represented by Mr. Samwel Welwel both learned counsels.

Supporting the appeal, Mr. Kizito submitted on the 1st ground that, the trial chairman of the trial tribunal erred in failing to analyse the evidence and as a result he delivered a wrong decision. He referred the

Court to the case of **Ismail Rashid vs. Mariam Msati**, Civil Appeal No. 75 of 2015 CAT Dsm (Unreported) where the Court of Appeal while quoting with approval the decision in the case of **Shemsa Khalifa and Two Others vs. Suleiman Mohamed**, Civil Appeal No. 82 of 2012 that, Judgement of any court must be grounded on the evidence adduced otherwise that will not be a judgment at all.

He argued that, after summarizing the parties' evidence, the trial chairman did not weigh the said evidence to the balance of probabilities as he generally concluded that the appellant was supposed to sue the SACCOS while the principle of privity to contract required the respondent as the one who was supposed to sue the SACCOS. Also, according to the evidence before the trial tribunal, the only issue was whether the loan was granted to Mary, the appellant's wife, and concluded that she was given the loan of Tshs 10,000,000/=.

However, there was no evidence to prove that such a transaction ever took place by a bank statement. Looking at the defence testimony, they said Mary applied for a loan of Tshs. 15,000,000/= but the same was never issued to her, as she was told, there was no money, she would be given next time. He asserted that the trial chairman erred in holding that, if Mary was not given the said loan, she would have taken action against

her properties being attached as collateral. He maintained that the trial chairperson was supposed to evaluate the evidence and find that the appellant's wife was not given any money.

He also argued that the trial chairman erred in finding that it was the respondent herein who was supposed to join the auctioneer and the SACCOS to resolve the conflicting evidence by tendering the bank statement.

In support of the second ground, the learned counsel submitted that the trial tribunal misdirected by answering the first issue in favour of the respondent herein even though the latter failed to prove the case on a balance of probability pursuant to sections 110 and 112 of the Evidence Act R.E 2022 as there is no bank statement tendered to prove that the money was disbursed in the appellant wife's account. Furthermore, he said exhibit P4 is not a concrete proof as the same only shows a mere application form which does not guarantee that the said money was disbursed.

As to the third and fourth grounds, learned counsel argued them jointly to the effect that, the auction was not done in accordance with the law governing auctions in Tanzania. He said further that, section 12 (2) of the Auctioneers Act, [Cap 227 R.E. 2019] provides that no sale by

auction of any land shall take place unless 14 days' notice has been given in the town or local area in which the land to be sold situate. The same must also be in English and Swahili and shall have details of the owner. Looking at the record, there is no evidence showing that the 14 days-notice was issued as required by the above sections. Also, the said notice was never communicated to the parties and the same was not tendered before the trial tribunal. To cement this argument, he referred the Court to the cases of **Judith Actionman vs. NMB and 2 Others**, High Court Land Appeal No. 5 of 2021, **Godbethat Rukanga vs. CRDB and African Inland Church of Tanzania** in which it was emphasized that, the procedure for a notice were supposed to be issued by the auctioneer.

The learned counsel went on submitting that, the application before the trial tribunal suffered a misjoinder of parties as per order I rule 10 of the **Civil Procedure Code**, Cap 33, R.E. 2019 (CPC) which allows the court to order the name of any party necessary to be joined or added to the suit. Therefore, since the auctioneer was not joined it was not proper to resolve the second issue raised by the trial tribunal as it did.

As to the last issue, learned counsel argued that the chairman gave his decision based on hearsay as the evidence before the tribunal was not

reflected in the Judgement. He prayed that the appeal be allowed with costs.

In reply, the Mr. Welwel submitted in opposition of the 1st ground that, the evidence was properly analysed and the decision of the tribunal was proper and correct as the respondent managed to prove his claims against the appellant. That, the respondent purchased the suit land in an open auction and he managed to tender the certificate of Sale as exhibit P1, the receipt showing that he paid the auction money as exhibit P2 and handing over report as exhibit P3. He also summoned witness from the SACCOS who testified the appellant's wife taking the loan, pledging the suit properly as collateral and defaulted paying the said loan which ended in auctioning the pledged property so as to realise the outstanding loan.

Regarding the issue of privity to contract, the learned counsel was of the opinion that, it was the appellant and his wife who took the loan and had they not taken the loan as alleged, they would have taken against the said auction. He went on arguing that, Regulation 83 of the Cooperative Societies Regulations G.N. No. 02 of 2015 provided for dispute resolution among the SACCOS Members. Provided that both the appellant and his wife were members, they ought to have taken their dispute to the proper

channel i.e. the tribunal, the registrar and last to the Minister. In the circumstances, the trial tribunal, properly analysed the evidence before it.

Submitting on the 2nd ground of appeal regarding money being disbursed into the appellant's wife's account, Mr. Welewel submitted that, there is exhibit P4 which is a proof that, the appellant and his wife borrowed money from the SACCOS. He argued that, it was their duty to disprove that the money in issue was never disbursed to them.

The learned council argued on the 3rd and 4th grounds jointly that, the procedure for the auction were followed and non-joinder of the parties did not prejudice the right of the parties. Also, parties are bound by their pleadings, and in the matter at hand, such issue was not raised by the appellant in his written statement of defence. On top of that, the appellant herein had already tried to challenge the auction in Application No. 74 of 2018 but the same was dismissed which is a proof that, there was Notice issued that is why he attempted to challenge the same. More so, the Director was summoned to and he gave evidence which was used by the trial tribunal in reaching to its decision.

On the 5th ground, the learned counsel submitted that, the trial tribunal based its decision on the evidence adduced and not otherwise.

He prayed that the appeal be dismissed and the decision of the trial tribunal be upheld.

In his brief rejoinder, Mr. Kizito maintained that, the case against the appellant was not proved at the required standard and the trial tribunal erred in deciding otherwise.

Having gone through the trial court's records as well as both parties submissions, I now proceed to determine the appeal having in mind that this being the 1st appellate court, I am duty bound to reassess evidence as a whole and come up with my own findings. In that regard, before proceeding to determining the grounds of appeal, I would like to start with the cause of action as stipulated under paragraph 6 (a) (v) and (vi) of the respondent's application filed at the trial tribunal, they read;

*v. **That**, on 23^d of May, 2018 the disputed land was officially handover the applicant and the Mbulumbulu Ward Executive Officer was officially notified in writing.*

*vi. **That**, on diverse dates from May, 2018, the respondent without any colour of right trespassed into the disputed land and forcefully restrained the applicant from continuing with cultivation activities by claiming ownership of the said farm. On the 21st of March, 2019, the respondent entered again in the disputed land and forcefully restrained the applicant to cultivate his farm an act which is unlawful.*

From the above cause of action the matter was heard and in reaching the final verdict, the trial tribunal raised the following issues for determination;

- 1. Endapo Ardhi ya mgogoro ilikuwa ni dhamana ya mkopo.*
- 2. Endapo mnada ulifanyika kihalali.*
- 3. Nafuu ambazo wadaawa wananweza kuzipata.*

Looking at the issues framed in relation to the cause of action pleaded, I find it odd in the sense that the raised issues are not aiming at proving the cause of action pleaded. From these issues the trial tribunal arrived to the decision that, the suit land was mortgaged as a security for a loan taken by the wife of the appellant. And that it was sold in a public auction to recover the loan taken by the wife of the appellant. It was thus concluded that, the respondent herein was the lawful owner of the suit land after buying the same from a public auction and the trial tribunal consequently ordered the appellant's eviction from the suit land.

It has to be noted that, the main complaint of the respondent herein at the trial tribunal was trespass and it is undisputed that, it was the respondent herein that emerged as the winner of the auction of the suit land. These can be proved by the respondent's testimony and exhibit tendered.

However, while exhibit P2 shows the "Certificate of Sale over a farm", exhibit P3 shows "*Taarifa ya Mnada wa Shamba la Ndugu Marry Blanka ulofanyika tarehe 07/05/2018 lililopo kitongoji cha Tlawi Juu katika kijiji cha Kambi ya Simba-Mbulumbulu.*" The latter was addressed to the Ward Executive Officer of Mbulumbulu Ward. Going through the trial tribunal's proceedings, I could not find a scintilla of proof that, the respondent was indeed handed over the suit land after the public auction as required under section 135 (5) of the **Land Act**, [Cap 113, R.E. 2019].

The section provides that;

*(5) A person refereed to under subsection (1), whether acting for himself or by or through the mortgagee from whom that person obtained the mortgaged property, **shall be entitled to possession of the mortgaged property immediately upon acceptance of a bid at a public auction or contract of sale of that mortgaged property.** (emphasis added)*

From the quoted provision above, the purchaser, respondent herein, was entitled to first take effective possession of the property he purchased immediately after the public auction before he was entitled to invoke the action of trespass property. That would have been by a handing over that ought to have been done by KKKT Mbulumbulu Umoja Saccos Ltd whom the suit land was mortgaged to. Reading between the lines, exhibit P3,

which the respondent claimed to be the handing over, is a mere auctioneer's report which does not give possession to him.

In lieu of the above, it is my considered opinion that, in absence of proof of respondent's effective possession of the suit land from KKKT Mbulumbulu Umoja Saccos Ltd, the respondent herein had not taken possession of the suit land for him to claim that it was trespassed upon by the appellant. In that regard, guided by the principle that, parties are bound by their pleadings, the respondent herein did not prove what he pleaded at the trial, a fact which was also glossed over by the trial tribunal.

It is my firm observation that, the proper cause of auction would have been Enforcement of Sale Agreement by KKKT Mbulumbulu Umoja Saccos Ltd and not trespass by the appellant herein. I hold so because, literally, having a certificate of sale is one thing and possession of the sold property is another. Unless the respondent herein was officially handed over the suit land, it was premature of him to claim trespass.

On the same note, I also find the parties to this case wanting as there was no prior connection between the parties without KKKT Mbulumbulu Umoja Saccos Ltd and the Auctioneers to be part of the case. As much as I am aware that non-joinder of the parties cannot affect the case as argued by the respondent's counsel, but this vary from case to

case. In case of **Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman & Another**, Civil Revision No.6 of 2017, the Court of Appeal laid down effects of non-joinder of a necessary party to the case. It defined necessary party as one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed. The Court was also of the view that, the determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case.

Among the relevant factors for such determination include particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed. It further held that;

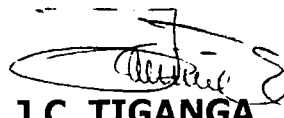
*"... There is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order 1 only holds good with respect to the misjoinder and non-joinder of non-necessary parties. **On the contrary, in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not be able to pass an effective decree. It would be idle for a court, so to say, to pass a decree which would be of no practical utility to the plaintiff...**" (emphasis added).*

In the upshot, I find the appeal is meritorious to the extent explained above. Consequently, I invoke my revisionary powers envisaged under section 43 (1) (b) of the **Land Disputes Act**, R.E. 2019, quash and set aside the trial tribunal's judgment and nullify the proceedings. Any interested party can pursue their right afresh in the court/tribunal of a competent jurisdiction. Since the omission and irregularities were partially caused by the tribunal, I give no order as to costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 15th day of December, 2023.




J.C. TIGANGA
JUDGE